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No. 00-1920

In the Supreme Court of the United States

DEERBROOK PAVILION, PETITIONER

v.

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of Health and Human Services has properly interpreted Medicare regulations to permit the collection of civil monetary penalties incurred by a previous operator of a skilled nursing facility from a successor that has assumed operation of the facility pursuant to the same Medicare provider agreement with the Secretary.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 235 F.3d 1100. The opinion of the district court (Pet. Supp. App. A1-A9) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 2000. A petition for rehearing was denied on March 22, 2001 (Pet. App. A24). The petition for a writ of certiorari was filed on June 20, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves civil monetary penalties imposed by the Health Care Financing Administration (HCFA), a component of the Department of Health and Human Services (HHS), on petitioner, the former operator of a skilled nursing facility in Kansas City, Missouri.[1] Before petitioner began operating the facility, HCFA found that its predecessors violated numerous sanitary standards and neglected the residents' basic needs, thereby placing their health in immediate jeopardy. As a result, in 1996, HCFA assessed civil monetary penalties of $419,700 against petitioner's predecessors pursuant to the agency's authority under the Medicare statute, 42 U.S.C. 1395i-3(h)(2)(B)(ii). In January 1997, petitioner began operating the facility. Instead of applying for a new Medicare provider agreement, however, petitioner accepted assignment of its predecessor's agreement with HCFA. HCFA sought to collect the civil monetary penalties from one of petitioner's predecessors, but that corporation was dissolved. HCFA then sought to recover the penalties from petitioner. Pet. App. A3.

2. Petitioner brought this action in district court to challenge HCFA's enforcement of civil monetary penalties against petitioner.[2] The district court granted the federal respondents' motion to dismiss for failure to

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[1] HCFA has recently been renamed the Centers for Medicare & Medicaid Services. 66 Fed. Reg. 35,437 (2001).

[2] In addition to suing the Secretary of HHS, the Department of HHS, HCFA, its Administrator, and two other HCFA officials (the federal respondents), petitioner also sued the Missouri Department of Social Services, the Missouri Division of Medical Services, and their Directors. Pet. App. A1. The court of appeals held that the claims against the state defendants were moot (*id.* at A5-A6), and petitioner does not challenge that holding in this Court.

state a valid claim. Pet. Supp. App. A1-A9. The court held that, as assignee of the Medicare provider agreement of its predecessor, petitioner became subject to the civil monetary penalties assessed against its predecessor under that agreement. *Id.* at A8.

3. The court of appeals affirmed, holding that HCFA had the authority to collect the civil monetary penalties from petitioner. Pet. App. A1-A9.[3] The court observed that Congress has given the Secretary of HHS "broad authority" to "'specify criteria, as to when and how each of such remedies [including civil monetary penalties] is to be applied.'" *Id.* at A6 (quoting 42 U.S.C. 1395i-3(h)(2)(B)). The court also observed that the Secretary's "regulations provide that when a change of ownership occurs, and the new owner assumes the existing provider agreement, the new owner assumes the agreement * * * 'subject to all applicable statutes and regulations and to the terms and conditions under which it was originally issued including, *but not limited to* * * * (1) Any existing plan of correction.'" *Ibid.* (quoting 42 C.F.R. 489.18). The court accordingly concluded that, "[j]ust as an existing plan of correction carries over to the subsequent owner, so too do the [civil monetary penalties] when the new owner accepts transfer of the existing provider agreement."

Judge Arnold dissented, but filed no opinion. Pet. App. A9. The court of appeals denied petitioner's petition for rehearing en banc, with four judges dissenting, again without an opinion. *Id.* at A24.

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[3] The court rejected the government's suggestion that the case had become moot because yet another firm has taken over operation of the facility. Because HCFA has withheld from petitioner $29,000 in Medicare payments as partial satisfaction of the civil monetary penalties, the court of appeals concluded that a live controversy remains. Pet. App. A4-A5.

ARGUMENT

1. Petitioner argues (Pet. 3, 5) that HCFA lacks the authority to collect from petitioner the civil monetary penalties incurred by a predecessor owner. The court of appeals properly held, however, that the operator of a skilled nursing facility may be held liable for civil penalties assessed against its predecessor for violation of Medicare standards, when the current operator takes over the same facility and accepts assignment of the predecessor's Medicare provider agreement with HCFA, rather than independently obtaining a new provider agreement.

The Medicare Act authorizes the Secretary of HHS to "specify criteria, as to when and how each of [the statutory] remedies [including civil monetary penalties] is to be applied" to a facility that has violated Medicare requirements. 42 U.S.C. 1395i-3(h)(2)(B). By regulation, the Secretary has addressed the circumstance of a change in the ownership of a skilled nursing facility. When there is such a change and the prior owner's Medicare provider agreement is assigned to the new owner—as it was in this case—the "assigned agreement is subject to all applicable statutes and regulations and to the terms and conditions under which it was originally issued including, *but not limited to* * * * [a]ny existing plan of correction." 42 C.F.R. 489.18(d)(1) (emphasis added). That regulation plainly contemplates that a new owner operating under the same Medicare agreement will be subject to remedies, including civil monetary penalties, that HCFA has imposed on the prior owner for the latter's Medicare violations. As the court of appeals explained, "[j]ust as an existing plan of correction carries over to the subsequent owner, so too do the [civil monetary penalties] when the new owner

accepts transfer of the existing provider agreement." Pet. App. A6.

That conclusion is further supported by 42 C.F.R. 488.414(d)(3)(i), which provides that "[a] facility may not avoid a remedy on the basis that it underwent a change of ownership." Thus, as HHS explained in promulgating the regulations, "when a change of ownership occurs, all Medicare penalties and sanctions are automatically assigned to the new owner or owners" (with one exception not pertinent here). 59 Fed. Reg. 56,116, 56,204 (1994); see also *id.* at 56,174 ("A facility is purchased 'as is.' The new owner acquires the compliance history, good or bad, as well as the assets."). The court of appeals therefore properly concluded that the Secretary's regulations authorized HCFA to collect civil monetary penalties from petitioner when petitioner assumed operation of the facility here at issue and accepted assignment of the predecessor's provider agreement.[4]

No other court has held to the contrary.[5] Indeed, the decision of the court of appeals is fully consistent with

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[4] Petitioner argues (Pet. 3, 5) that HCFA lacked the statutory basis to deduct the amount of the penalty from petitioner's reimbursement payments, because 42 U.S.C. 1320a-7a(f) (1994 & Supp. 1999) permits such a deduction only from sums owed to the provider against whom the penalty has been assessed. As explained in the text, however, when petitioner accepted assignment of its predecessor's provider agreement, it accepted the terms and conditions of that agreement, including the authority of HCFA to deduct the amount of the penalties from the amount of reimbursement due the provider.

[5] Petitioner suggests (Pet. 18) that *Texas Department of Human Services* v. *Kemp Health Services, Inc.*, 993 S.W.2d 698 (Tex. Ct. App. 1999), is inconsistent with the court of appeals' decision. In *Kemp Health Services, Inc.*, the court held that a state agency lacked the authority to collect from the new owner of a

other precedent involving closely related circumstances. In *United States* v. *Vernon Home Health, Inc.*, 21 F.3d 693, cert. denied, 513 U.S. 1015 (1994), the Fifth Circuit held that a new owner of a Medicare provider is liable for Medicare overpayments made to the prior owner. The court's decision rested, in part, on the fact that, under 42 C.F.R. 489.18(d), an assigned provider agreement "is subject to all applicable statutes and regulations and to the terms and conditions under which it was originally issued." 21 F.3d at 696. The court explained that the new owner "could have chosen not to accept the automatic assignment of the provider agreement" and, instead, could have applied as a new participant in the Medicare program. *Ibid.* But "[b]y accepting that assignment, [it] agreed * * * to accept the terms and conditions of the regulatory scheme,"

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health care facility penalties assessed against the facility's previous owner for Medicaid violations. The court observed that a Medicaid regulation, 42 C.F.R. 442.14(b), provides that an assignment of a Medicaid contract is subject to "'the terms and conditions under which' the Medicaid contract '*was originally issued.*'" 993 S.W.2d at 702. The court found that the regulation barred imposition of the civil penalties at issue, because those sanctions "were not a part of [the predecessor's] contract as 'it was originally issued.'" *Ibid.* The court further held that the state lacked the authority to collect the penalties against the successor because there had been no "change in ownership" within the meaning of a state regulation that permitted the collection of civil monetary penalties against a successor owner upon a "change in ownership." *Id.* at 702-703. The court's interpretation of the federal Medicaid regulation, which is worded similarly to 42 C.F.R. 489.18, therefore was entirely dicta, because the interpretation of the Medicaid regulation was not necessary to the court's disposition in the case. In any event, any tension between the decision below and the decision by the intermediate state court of appeals in *Kemp Health Services, Inc.*, does not warrant this Court's review. See Sup. Ct. R. 10(a).

making it "liable for the overpayments" made to the facility's previous owner. *Ibid.* As the court of appeals in the instant case concluded, the same reasoning applies here. Pet. App. A8.

2. Petitioner also argues (Pet. 15-19) that the collection of monetary penalties from successor owners of skilled nursing facilities reflects bad policy. Congress, however, has vested in the Secretary the authority to make judgments about which policies best serve the interests of the Medicare program. See 42 U.S.C. 1395hh (conferring legislative rulemaking on the Secretary to implement the Act); 42 U.S.C. 1395i-3(h)(2)(B) (authorizing the Secretary to "specify criteria, as to when and how each of such remedies [including civil monetary penalties] is to be applied").

In any event, sound reasons support the Secretary's interpretation of his regulations. As the court of appeals recognized, successor liability discourages sham transactions in which a skilled nursing facility operator could escape paying civil monetary penalties imposed against it for violating Medicare standards simply by establishing a new corporate entity to operate the facility. Pet. App. A8. Obligating new owners to pay civil penalties "ensure[s] prompt compliance with program requirements," 42 C.F.R. 488.402(a), thereby serving as a deterrent to future violations. A new owner or operator of a skilled nursing facility, moreover, can attempt to avoid liability for a predecessor's civil monetary penalties by refusing to accept the automatic assignment of the previous provider agreement and applying for a new agreement in its own right. Pet. App. A9. Moreover, given the public availability of a facility's history of compliance with Medicare standards and regulations, see 42 U.S.C. 1395i-3(g)(5)(A), a new owner exercising due diligence

can negotiate a purchase price that reflects any liability for unpaid penalties. Pet. App. A9.

3. Petitioner also contends (Pet. Supp. Br. 1-2) that the court of appeals erred in deferring to a HCFA internal memorandum on the successorship issue and that this Court should accordingly grant certiorari and remand the case for further proceedings in light of *United States* v. *Mead Corp.*, 121 S. Ct. 2164 (2001). That contention is without merit.

The internal agency memorandum was not the principal basis for the court of appeals' holding that petitioner assumed liability for payment of the civil monetary penalties assessed against its predecessor when it accepted assignment of the predecessor's provider agreement. Rather, the court of appeals based its holding on an analysis of the Secretary's regulation, 42 C.F.R. 489.18 (see Pet. App. A6-A7), and the court made but a single, brief reference to the memorandum. *Id.* at A6. Moreover, the memorandum merely reflects HCFA's consistent position on successor liability set forth in other publicly available rulemaking and adjudicatory documents. See, *e.g.*, 59 Fed. Reg. at 56,204 ("when a change of ownership occurs, all Medicare penalties and sanctions are automatically assigned to the new owner"); *Wellington Oaks Care Ctr.* v. *HCFA*, No. C-96-203, 1997 WL 72173, at *15-*16 (Civ. Rem. Div. Jan. 28, 1997) ("Enforcement remedies imposed upon the provider, in connection with a provider agreement, are not affected by a change of ownership. HCFA's relationship is with the provider, and HCFA is not precluded by changes of ownership from collecting monies due, including [civil monetary penalties]."), aff'd, No. C-96-203, 1997 WL 607119 (HHS App. Bd. Aug. 21, 1997). Thus, petitioner is mistaken in suggesting that the regulatory interpretation here at issue was rendered

solely in an informal, internal agency document issued in 1994.

A remand in light of *Mead* is inappropriate for another reason as well. In *Mead*, the Court held that the "administrative implementation of a particular *statutory provision*" is entitled to considerable deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 121 S. Ct. at 2171 (emphasis added).[6] Here, the court of appeals held that the Secretary reasonably construed the Medicare *regulations* to authorize HCFA to collect civil monetary penalties from a successor owner of a nursing facility that has assumed its predecessor's provider agreement. See Pet. App. A6 (holding that "HCFA has the ability to impose [civil monetary penalties] on subsequent nursing home owners * * * under the regulations").

It is well established—especially in the context of Medicare regulations—that "an agency's interpretation of its own regulations" is entitled to "substantial defer-

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[6] Applying that principle, the Court concluded that a tariff classification ruling by the United States Customs Service—which had not been adopted through notice-and-comment rulemaking, adjudication, or some other means in circumstances where there were indicia of congressional intent that such rulings have the force of law—did not qualify for *Chevron* deference. 121 S. Ct. at 2171. The Court did not hold, however, that the Customs interpretation was entitled to no deference, but instead remanded for consideration of whether deference under the standard set forth in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), was warranted. 121 S. Ct. at 2175-2177.

ence." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). See *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 94-95 (1995). As the Court explained in *Thomas Jefferson*, "[t]his broad deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" 512 U.S. at 512 (citation omitted).

There is no suggestion in *Mead* that casts doubt on that principle of deference to an agency's interpretation of its own regulations, which the Court has repeatedly, and recently, confirmed. *United States* v. *Cleveland Indians Baseball Co.*, 121 S. Ct. 1433, 1444-1445 (2001); *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359, 377 (1998); *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); see also *Mead*, 121 S. Ct. at 2181 (Scalia, J., dissenting) (the majority "leaves untouched" the principle that "judges must defer to reasonable agency interpretations of their own regulations"). The court of appeals was therefore on solid ground in stating that an agency's "interpretation of its own regulations is entitled to great deference." Pet. App. A7.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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